In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In view of respondent's continued reliance on the proposition that there is room in this federal condemnation case for the application of state law, we are setting forth, for the convenience of the Court, relevant statutory materials to which we referred in our opening brief but did not print *verbatim*. These provisions follow in chronological order:

(1) *50 U.S.C. 171*

The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use

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thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. (Aug. 18, 1890, ch. 797, § 1, 26 Stat. 316; July 2, 1917, ch. 35, 40

Stat. 241; Apr. 11, 1918, ch. 51, 40 Stat. 518; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

(2) *Federal Rules of Civil Procedure, Rule 71A* (effective August 1, 1951):

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

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(c) *Complaint.*

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that

property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

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(3) *10 U.S.C. (Supp. V) 2663*

(a) The Secretary of a military department may have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land, including temporary use, needed for—

(1) the site, construction, or operation of fortifications, coast defenses, or military training camps;

(2) the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives or other munitions of war; or

(3) the development and transmission of power for the operation of plants under clause (2).

Proceedings under this subsection shall be in accordance with the law of the State in which the suit is brought.

(b) In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired.

(c) The Secretary of the military department concerned may contract for or buy any interest in land, including temporary use, needed for any purpose named in subsection (a), as soon as the owner fixes a price for it and the Secretary considers that price to be reasonable.

(d) The Secretary of the military department concerned may accept for the United States a gift of any interest in land, including temporary use, for any purpose named in subsection (a). (Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 147.)

(4) *Act of September 2, 1958,* 72 Stat. 1437, 1565, 1568

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Sec. 33(a) * * *

(14) Section 2663(a) is amended by striking out the last sentence.

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Sec. 33(g) This section is effective as of August 10, 1956, for all purposes.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

SUPREME COURT OF THE UNITED STATES

No. 573.—October Term, 1958.

United States, Petitioner, *v.* 93.970 Acres of Land, and Illinois Aircraft Services and Sales Co.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 22, 1959.]

Mr. Justice Black delivered the opinion of the Court.

The basic question presented in this case is whether the United States can have adjudicated under one complaint (1) the claim by a third person of a valuable possessory interest in government property and (2) condemnation and value of that interest, if any. In 1947 the United States leased an airfield to respondent Illinois Aircraft Services & Sales Co. The preamble to the lease stated that because of the strategic value of the field the Government considered it essential to retain it "in a stand-by status for post-war use in connection with Naval Aviation activities . . . ." [1] One paragraph of the lease provided:

> "It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the

[1] The preamble reads:

"Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and

. . . . . .

"Whereas, the use of the airfield and facilities by the Lessee . . . will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

> Lessee in writing, sixty (60) days prior to such termination, . . . in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

In 1954 the Army wanted to use the property for an aerial defense missile (NIKE) site. Timely notice of revocation was delivered to respondent under the signatures of the Secretaries of the Army and Navy, stating that a national emergency declared by the President in 1950 was still in effect and that both Secretaries deemed revocation of the lease essential. Respondent declined to leave the land, claiming that the Government had gone beyond the authority granted by the lease in attempting to revoke it for use by the Army rather than in connection with Naval Aviation activities mentioned in the preamble to the lease.

In order to obtain possession and use of the land as soon as possible—and without waiting to try out the validity of the prior revocation in a separate action or actions—the Government filed a complaint to condemn whatever possessory interest respondent might be adjudicated to have. Although the Government's complaint alleged that it had revoked the lease and, in effect, that respondent had no compensable interest in the property taken, the District Court ruled that by suing for condemnation the United States had "elected" to abandon its prior revocation. On this basis the court found that respondent had a compensable interest and let a jury determine its value. Under instructions that the lease was revocable only if needed for "aviation purposes" and that a NIKE site was not such a purpose, the jury returned a $25,000 verdict for respondents. On appeal the United States Court of Appeals for the Seventh Circuit affirmed this verdict by a divided court. 258 F. 2d 17. It held (1) that the doctrine of "election of remedies" applied and barred con-

sideration of the revocation whether state or federal law governed and (2) that the lease could only be validly revoked under its terms if the Government planned to use the land for "aviation purposes." To review the severe restrictions the court's holding places on the ability of the United States to get, quickly, land it may need for government purposes, we granted certiorari. 358 U. S. 945.[2]

We cannot agree that the lease permitted revocation only if the Government wanted the land for "aviation purposes." It is true that the preamble to the agreement states that the airfield was leased, rather than sold, because it was needed in stand-by status for naval aviation activities. It is also true that immediately following the preamble there is a statement, common in many contracts, that "Now Therefore, in consideration of the foregoing, and of the covenants hereinafter mentioned, the Government" leases the airport. There is no indication, however, either in the lease itself or as far as we have been shown, in the history of the agreement, that this preamble and the formal legal statement immediately following it meant to limit the express, and unequivocal clause of the lease allowing revocation at the will of the Secretary of the Navy in the event of a national emergency. Instead the preamble can be easily understood, in view of the Surplus Property Act of 1944, which required all *surplus* property to be disposed of, as a mere statement of why the property was not considered surplus.[3] In addition the statute which authorized the air-

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[2] The decision of the court below is also in apparent conflict with *United States* v. *San Geronimo Dev. Co.*, 154 F. 2d 78 (C. A. 1st Cir.), and *United States* v. *Turner*, 175 F. 2d 644 (C. A. 5th Cir.).

[3] 58 Stat. 767–770, 777, as amended, 50 U. S. C. App. (1946 ed.) §§ 1612 (e), 1613, 1620, 1632.

port lease, provided that such leases shall be revocable "at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary . . . during a national emergency declared by the President." [4] Under the circumstances, we cannot and will not assume that an explicit revocation clause in the lease means any less than it seems to mean. We therefore hold that the revocation was valid and effective.

It follows necessarily from this that application of the doctrine of "election of remedies" would put the Government in an impossible situation. For under the doctrine, the Government must choose either to abandon its power to revoke the lease or to give up its right to immediate possession under condemnation law, a right which is not here questioned. We see no reason either in justice or authority why such a Hobson's choice should be imposed and why the Government should be forced to pay for property which it rightfully owns merely because it attempted to avoid delays which the applicable laws seek to prevent. Such a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit.[5]

Respondents argue, however, that election of remedies is part of the law of Illinois and that Illinois law applies here. We cannot agree with this view. Condemnation

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[4] 61 Stat. 774, 34 U. S. C. § 522a. The current version of this statute is found in 10 U. S. C. (Supp. V) § 2667. We assume without deciding that this statute is applicable although an argument can be made for the applicability of a prior statute. That law provided that leases must be "revocable at any time." 39 Stat. 559, 34 U. S. C. (1946 ed.) § 522.

[5] Cf. *Conley* v. *Gibson*, 355 U. S. 41, 48. See also Fed. Rules Civ. Proc., 1, 2, 18.

involves essential governmental functions. See *Kohl* v. *United States*, 91 U. S. 367. We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable.[6] It is apparent that no such choice has been made here.[7]

The judgment of the Court of Appeals is

Reversed.

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[6] See, *e. g.*, *Kohl* v. *United States*, 91 U. S. 367, 374; *United States* v. *Miller*, 317 U. S. 369, 380; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Bank of America Nat. T. & S. Assn.* v. *Parnell*, 352 U. S. 29.

[7] Respondents rely on 26 Stat. 316, as amended, 50 U. S. C. § 171, which provided that condemnation proceedings like the one here involved were "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." But it is settled that this language required conformity in procedural matters only. See *United States* v. *Miller*, 317 U. S. 369, 379–380 (citing 25 Stat. 94); *Kanakanui* v. *United States*, 244 F. 923; *Nebraska* v. *United States*, 164 F. 2d 866, affirming, *United States* v. *19,573.59 Acres of Land*, 70 F. Supp. 610. And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure, at the time this suit was brought. It follows that federal law was wholly applicable to this case. In reaching this conclusion we express no opinion on the possible effect on other cases of the re-enactment of this conformity clause in 70A Stat. 148, 10 U. S. C. (Supp. V) § 2663 (a) (1956), or its subsequent repeal, retroactive to the time of re-enactment, by the Act of September 2, 1958. 72 Stat. 1565, 1568.